LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAY 8 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. ~~1969~~ 70-154

JOHNNIE PRUETT,
Petitioner

v.

THE STATE OF TEXAS, and
J. F. CLAWSON, Jr.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

DAVID L. TISINGER
402 First National Life Building
Austin, Texas 78701
Counsel for Appellant

FIRM FOUNDATION—AUSTIN

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2-4
Statutes and Constitutional Provisions Involved	5-11
Statement of the Case	11-12
How Federal Questions Presented	14
Reasons for Granting the Writ	14

1. In denying Petitioner leave to Intervene, and in refusing to follow North Carolina v. Pearce, 395 U. S. 711, 719, f. n. 13, the Court of Criminal Appeals denied the equal protection of the laws to Petitioner in a manner calculated to shake criminal jurisprudence throughout the nation. ---- 14

2. The decision below provides for double punishment. ---- 17

3. The decision below particularly denied equal protection of the laws in permitting an appeal by the State of Texas, when such is prohibited under Texas law. ---- 19

4. The Court of Criminal Appeals denied due process to Petitioner by not allowing him a day in court, and by not giving him notice of a proceeding wherein his liberty was directly involved. ---- 19

5. The Court of Criminal Appeals has attempted to insulate its decision from attack here by

Page

professing to interpret a State Statute, Article 5118a, in such a way as to justify its order and protect itself since ordinarily its interpretation of a State statute can not be reviewed; but such attempt must fall because its "interpretation" offends the federal constitution, and particularly the equal protection clause. ---- 22

Conclusion ---- 24

Index to Appendix

Appendix A—Opinion of Court of Criminal Appeals ---- 25

Appendix A-1—Certificate of Clerk of Court of Criminal Appeals ---- 35

Appendix B—Motion for Leave to Intervene ---- 37

Motion for Postponement ---- 38

Intervenor's Motion to Dismiss ---- 42

Alternative Plea for Relief (in Court of Criminal Appeals) ---- 50

Application for Stay ---- 52

Appendix C—Motion of Defendant for Resentencing and for Proper Credit on his Jail Term ---- 56

Defendant's Memorandum Brief on Motion for Resentencing and Discharge ---- 58

CITATIONS

Page

Cases:

Ex parte Anderson (Tex. Crim. App. 1946), 192 S. W. (2) 280 ---- 18

Armstrong v. Manzo, 380 U. S. 545 ---- 21

Arsenault v. Massachusetts, 393 U. S. 5 ---- 18

Barbier v. Connolly, 113 U. S. 27 ---- 17

Bennett v. State, 450 S. W. (2) 652, 657 ---- 18

Burns v. Ohio, 360 U. S. 252 ---- 18

Ex Parte Carlile, 92 Tex. Crim. Rep. 495, 244 S. W. 611 ---- 19

Chandler v. Fulton, 10 Tex. 2 ---- 21

Cochran v. Kansas, 316 U. S. 255 ---- 18

Fite v. State (Tenn. 1905) 88 S. W. 941 ---- 16, 23

Fryckberg v. Scott (Tex. Civ. App), 218 S. W. 21, 23 ---- 18

Garner v. Smith, 40 Tex. 505 ---- 21

Hansbery v. Lee, 311 U. S. 32 ---- 21

Harvey v. State, 201 S. W. (2) 42 ---- 17

Holt v. Virginia, 381 U. S. 131 ---- 21

Hovey v. Elliott, 167 U. S. 409 ---- 21

Hill v. Texas, 316 U. S. 400 ---- 16

Ex Parte Hull, 312 U. S. 546 ---- 18

CITATIONS—Continued

Page

Meadors v. State, Tex. Crim. App., 260 S. W. 580 17

Nichols v. Dalllas, 347 S. W. (2) 326 23

North Carolina v. Pearce, 395 U. S. 711, 719 ..... 2, 12, 14, 15, 18

Robinson v. Beto, 426 Fed. (2) 797 ..... 17, 18

Smith v. Bennett, 365 U. S. 708 18

Snow v. State, 134 Tex. Crim. Rep. 263, 114 S. W. (2) 898 19

Snyder v. Massachusetts, 291 U. S. 97 21

Southwest Savings & Loan v. Faulkner, 331 S. W. (2) 917 23

Texts:

American Jurisprudence:
Vol. 41, page 916 23

American Jurisprudence (Second):
Volume 16:
Pages 941-942 21

Pages 969 et seq. 23

Antieau, Modern Constitutional Law:
Sec. 5:123 19

Corpus Juris Secundum:
Vol. 72, page 886 ..... 23, 24

Texas Jurisprudence (Second)
Vol. 44, page 197 21

CITATIONS—Continued

Page

Constitutional Provisions:

United States Constitution:
- First Amendment ---- 3, 4, 5
- Fifth Amendment ---- 3, 4, 5, 17, 19
- Sixth Amendment ---- 3, 4, 5
- Fourteenth Amendment ---- 2, 3, 4, 5, 19, 21

Texas Constitution:
- Article 5, Section 8 ---- 6
- Article 5, Section 26 ---- 7, 19

Rules of Court:

- Rule 19, par. 1(a) ---- 2, 15
- Rule 23 (1) (f) ---- 14

Statutes:

Federal:
- Title 42, Sec. 1983, U. S. C. ---- 4, 6

Texas Statutes:

Code of Criminal Procedure:
- Article 42.03 ---- 3, 12
- Article 44.01 ---- 7, 19

CITATIONS—Continued

Page

Revised Civil Statutes:

Article 5118a ----------4, 10, 12, 15, 22

Article 6184 l ----------8, 12, 15, 16, 22

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. -----

JOHNNIE PRUETT,

Petitioner

v.

THE STATE OF TEXAS, and
J. F. CLAWSON, Jr.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

The Petitioner, Johnnie Pruett, prays that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of the State of Texas, entered March 31, 1971.

Opinions Below

The opinion of the Court of Criminal Appeals, not yet reported, appears in Appendix A hereto, post page 25.

Jurisdiction

The judgment and opinion of the Court of Criminal Appeals was delivered March 31, 1971. No motion for rehearing was permitted; the judgment is final; the Court of Criminal Appeals is the highest Court in Texas on such matters. This petition for certiorari was filed within 90 days after March 31, 1971. The jurisdiction of the Supreme Court is invoked under 28 U. S. C. Sec. 1257 (3). We believe that jurisdiction also exists under Supreme Court Rule 19, paragraph 1 (a).

QUESTIONS PRESENTED

1. Whether Johnnie Pruett, a convicted felon, who was discharged, after serving 22 months in jail, by a trial court of general jurisdiction on re-sentencing, which court gave credit for good conduct in line with *North Carolina v. Pearce*, 395 U. S. 711, 719, f. n. 13, was denied procedural due process and *equal protection of the laws*, as guaranteed by the 14th Amendment, when he was refused leave to intervene in an original proceeding in the Court of Criminal Appeals of Texas, when such proceeding was successfully brought by the State of Texas against the trial judge who discharged Pruett, forcing such trial judge to vacate his order of discharge, deny "good conduct" time, and further forcing the trial judge to order Petitioner's re-arrest.

2. Whether Johnnie Pruett, a prisoner in jail pending appeal of his case, who earned credit upon his sentence for good conduct during the appeal, can be constitutionally denied the credit in sentencing him, in view of the 1st, 5th and 14th Amendments to the Constitution of the United States.

3. Whether Johnnie Pruett, a prisoner being resentenced under a State Statute, Article 42.03 of the Texas Code of Criminal Procedure, after the termination of his appeal, and receipt of the mandate of the Court of Criminal Appeals, must be credited with pre-sentence time and with "good conduct" commutation, admittedly earned while in jail pending appeal, in view of the 1st, 5th and 14th Amendments to the Constitution of the United States.

4. Whether when Johnnie Pruett, a prisoner, has lain in county jail during his appeal, and the Texas statutes provide that for good conduct an inmate of a county jail shall be entitled to a credit of an additional one-third of the time served, and such statutes also provide that an inmate of the penitentiary shall be entitled to an equivalent or greater credit for good conduct, and the trial court finds good conduct and awards a credit of one-third, the Court of Criminal Appeals can constitutionally void such credit in view of the 1st, 5th and 14th Amendments to the Constitution of the United States.

5. Whether the Court of Criminal Appeals of Texas can, in an original proceeding, vacate a sentence of a prisoner, Johnnie Pruett, pronounced under Article 42.03 of the Texas Code of Criminal Procedure as a "re-sentencing" after prior issuance of the mandate of the Court of Criminal Appeals, especially when the

re-sentencing amounted to an express discharge of the prisoner, in view of his good conduct credits, without giving the prisoner notice of the original proceeding, and without allowing him to appear, but allowing only that his counsel appear amicus curiae and argue for ten minutes as amicus curiae; in view of the 1st, 5th, 6th and 14th Amendments to the Constitution of the United States.

6. Whether the Court of Criminal Appeals of Texas can, under the guise of an original proceeding in this case, allow the State of Texas an appeal in this case, when the Statutes and Constitution of Texas do not allow the State an appeal, and thereby void Petitioner's discharge and restoration to liberty, awarded by the trial court, in view of the 1st, 5th, and 14th Amendments to the Constitution of the United States.

7. Whether in view of Title 42, Sec. 1983, the Civil Rights Statute, the Court of Criminal Appeals in an original proceeding, without notice to Petitioner and denying Petitioner's counsel the right to appear (except as amicus curiae), could void the good-time credit given Petitioner on his re-sentencing by the trial court, order Petitioner's arrest and confinement in the Penitentiary and deny him a rehearing in view of the 1st, 5th, 6th, and 14th Amendments to the Constitution of the United States.

8. Whether Article 5118a of the Revised Civil Statutes of Texas should be construed as denying the right to credit for good conduct to Petitioner, a prisoner awaiting the outcome of an appeal, in view of the 1st, 5th and 14th Amendments to the Constitution of the United States.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The text of the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States read as follows:

AMENDMENT [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI]

In all criminal prosecutions the accused shall enjoy the right * * * and to have the assistance of counsel * *.

AMENDMENT [XIV]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42, Sec. 1983 U. S. C. provides:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Article 5 of the Texas Constitution provides:

§ 8. Jurisdiction of District Court

Sec. 8. The District Court shall have original jurisdiction in all criminal cases of the grade of felony;

* * * * *

The District Court shall have appellate jurisdiction and general supervisory control over the County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law; *and shall have general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is*

not provided by law or this Constitution, and such other jurisdiction, original and appellate, as may be provided by law. As amended Aug. 11, 1891; proclamation Sept. 22, 1891. (emphasis supplied)

Article 5 of the Texas Constitution provides:

§ 26. Criminal cases; no appeal by state

Sec. 26. The State shall have no right of appeal in criminal cases.

The Texas Code of Criminal Procedure provides:

Article 44.01 [812] [893] [871] State cannot appeal

The State shall have no right of appeal in criminal actions.

The Texas Code of Criminal Procedure provides:

Art. 42.03 [768] [855] [833] Pronouncing sentence; time; credit for time spent in jail between arrest and sentence or pending appeal

If a new trial is not granted, nor judgment arrested in felony and misdemeanor cases, the sentence shall be pronounced in the presence of the defendant at any time after the expiration of the time allowed for making the motion for a new trial or the motion in arrest of judgment; provided that in all criminal cases the judge of the court in which defendant was convicted may within his discretion, give the defendant credit on his sentence for the time, or any part thereof, which said defendant has spent in jail in said cause, from

the time of his arrest and confinement until his sentence by the trial court; and provided further, that in all cases where the defendant has been tried for any violation of the laws of the State of Texas, and has been convicted and has appealed from said judgment and sentence of conviction, and where said cause has been affirmed by the Court of Criminal Appeals, and after receipt of the mandate by the clerk of the trial court, *the judge is authorized to again call said defendant before him; and if pending appeal, the defendant has not made bond and has remained in jail pending the time of such appeal, said trial judge may then in his discretion resentence the defendant, and may subtract from the original sentence pronounced upon the defendant, the length of time the defendant has lain in jail pending such appeal,* noting any credit allowed upon mandate, which credit shall be allowed by the Texas Department of Corrections in all computations affecting the eligibility of the defendant for parole or discharge. Where jail time has been awarded, the trial judge may, when in his discretion the ends of justice would best be served, sentence the defendant to serve his sentence during his off-work hours, or on week-ends. When such a sentence is permitted by the trial judge it must be served on consecutive days or consecutive week-ends. The trial judge may require bail of the defendant to insure the faithful performance of the sentence. The trial judge may attach conditions regarding the employment, travel, and other conduct of the defendant during the performance of such a sentence. (italics supplied)

The Revised Civil Statutes of Texas provide:

Art. 6184 l. Commutation for good conduct

In order to encourage prison discipline, a distinction may be made in the treatment of prisoners so as to extend to all such as are orderly, industrious and obedient, comforts and privileges according to their deserts. The reward to be bestowed on prisoners for good conduct shall consist of such relaxation of strict prison rules and extension of social privileges as may be consistent with proper discipline. Commutation of time for good conduct, industry and obedience shall be granted by the General Manager[1] *and twenty (20) days per month deduction shall be made from the term or terms of sentences of all prisoners in Class I;* provided, however, that for State-approved trusties thirty (30) days deduction per month shall be made from the term or terms of all sentences of such State-approved trusties, and ten (10) days per month deduction shall be made from the term or terms of sentences of all prisoners in Class II as hereinafter provided, when no charge of misconduct has been sustained against a prisoner. * * * * * No overtime allowance or credits, in addition to the commutation of time herein provided for good conduct, may be deducted from the term or terms of sentences with the exception that for extra meritorious conduct on the part of any prisoner, he may be recommended to the Board of Pardons and Paroles and to the Governor for increased commutation or for a pardon or parole. * * * * *

The Classification Committee, as soon as practicable, shall classify all prisoners according to their industry, conduct and obedience in three (3) classifications: Class I, Class II, Class III, and reclassify any of such prisoners from time to time as in their opinion the circumstances may require. *The General Manager*

[1]Changed to director. See art. 6166a—1.

shall keep or cause to be kept a conduct record in card or ledger form and a calendar card on each inmate showing all classifications, changes of classifications and forfeitures of commutation of time and reasons therefor. As soon as practicable, the General Manager shall change the conduct records of prisoners now in the penitentiary to conform with said conduct record and calendar card. * * * * * (emphasis added)

The Revised Civil Statutes of Texas also provide:

Art. 5118a. Commutation for good conduct; forfeiture of commutation; record

In order to encourage county jail discipline, a distinction may be made in the terms of prisoners so as to extend to all such as are orderly, industrious and obedient, comforts and privileges according to their deserts; the reward to be bestowed on prisoners for good conduct shall consist of such relaxation of strict county jail rules, and extension of social privileges as may be consistent with proper discipline. Commutation of time for good conduct, industry and obedience may be granted the inmates of each county jail by the sheriff in charge. A deduction in time not to exceed one third (1/3) of the original sentence may be made from the term or terms of sentences when no charge of misconduct has been sustained against the prisoner. This Act shall be applicable regardless of whether the judgment of conviction is a fine or jail sentence or a combination of jail sentence and fine. A prisoner under two (2) or more cumulative sentences shall be allowed commutation as if they were all one sentence. *For such sustained charge of misconduct in violation*

of any rule known to the prisoner (including escape or attempt to escape) any part or all of the commutation which shall have accrued in favor of the prisoner to the date of said misconduct may be forfeited and taken away by the sheriff. No other time allowance or credits in addition to the commutation of time for good conduct herein provided for may be deducted from the term or terms of sentences. *The sheriff shall keep or cause to be kept a conduct record in card or ledger form and a calendar card on each inmate showing all forfeitures of commutation time and the reasons therefor.* As amended Acts 1963, 58th Leg., p. 943, ch. 371, § 1. (emphasis added)

STATEMENT OF THE CASE

The facts material to the consideration of the questions presented are:

Petitioner was convicted of sodomy in July 1969, by the District Court of Coryell County, Texas. He duly appealed and his conviction was affirmed by the Court of Criminal Appeals of Texas in November, 1970. He duly appealed from that affirmance and his appeal therefrom still pends before the Supreme Court of the United States in Cause No. 1390, styled Johnnie Pruett vs. The State of Texas, pending rehearing.

Stays were temporarily granted by the Court of Criminal Appeals but further stays were denied by the Supreme Court, although the appeal still pends, as aforesaid.

The Court of Criminal Appeals issued its mandate,

affirming Petitioner's two-year sentence, to the Court of Coryell County (District Court) which tried Petitioner. Such mandate was issued March 3, 1971, and pursuant to the Texas Statute, Article 42.03 of the Code of Criminal Procedure, the trial Court, the Honorable J. F. Clawson, Jr., proceeded to re-sentence Petitioner. Upon such re-sentencing, Judge Clawson found that Petitioner had lain in jail since April 15, 1969, and that Petitioner was entitled to credit on his sentence for part of such time in jail. This included the time in jail on appeal. Judge Clawson also allowed a credit for 1/3 additionally upon such time for good conduct, because *both the county jail statute, Article 5118 a, and the penitentiary Statute, Article 6184 l, allow a credit for at least 1/3 of confinement time for good conduct.* Judge Clawson held that to deny Petitioner the credit for 1/3 would deny him the equal protection of the laws and would subject him to double punishment contrary to the rules laid down by the Supreme Court under *North Carolina v. Pearce*, 395 U. S. 711, 719, F.N. 13.

Applying the 1/3 credit for good behavior, Judge Clawson held that Petitioner had more than served his time, and he thus discharged Petitioner.

On March 17, 1971, the District Attorney for the 52nd Judicial District for Coryell County sought a Writ of Prohibition from the Court of Criminal Appeals. No notice of this Application was served on Johnnie Pruett nor was it served on Johnnie Pruett's attorneys. On the same date, March 17, 1971, the Court of Criminal Appeals issued an order to show cause to Judge Clawson commanding him to appear on March 19, 1971, at 2:00 p.m. and show why a Writ

of Prohibition should not be granted vacating Judge Clawson's order.

No notice of the Show Cause Order was issued to Johnnie Pruett. Johnnie Pruett's attorneys found out about it from Judge Clawson over long distance telephone on the evening of March 17. On the morning of March 18, such attorneys immediately went to Judge Onion, the Presiding Judge of the Court of Criminal Appeals and asked if they would be allowed to appear and they were told that they would be allowed to appear. They told Judge Onion that not enough time had been allowed and Judge Onion stated that the case had been moved up until Monday, March 22, at the instance of Judge Clawson's attorneys. Petitioner's attorney told Judge Onion that that was not enough time, and more time was desired, and Judge Onion stated that the Court would not grant nor be receptive of a motion for further time. On March 22, 1971, Petitioner filed a Motion for Leave to Intervene, a Motion for Postponement, and a Motion to Dismiss. All these were summarily denied by the Court of Criminal Appeals without hearing within three hours, except it stated it would allow the Motion for Leave to Intervene to be treated as an Application of Amicus Curiae and as such granted (Appendix A-1, page 35 post), but only ten minutes was allowed the Petitioner's attorney to argue as amicus curiae, the same day.

On March 31, 1971, the Court of Criminal Appeals ordered Judge Clawson to vacate Petitioner's discharge and to have Petitioner arrested.

HOW FEDERAL QUESTIONS PRESENTED

The Opinion of the Court of Criminal Appeals is, as stated, in Appendix A, page 25 post. It was delivered March 31, 1971. It does not expressly pass on the constitutional issues. However, the fact that we duly and specifically raised the constitutional issues is shown in our Motion for Leave to Intervene, Motion to Postpone, and Motion to Dismiss filed in the Court of Criminal Appeals, and also in our Motion for Stay, filed in the Court of Criminal Appeals. These are lengthy and copied for the convenience of the Court in Appendix B, post, pages 36 to 55.

In compliance with Rule 23 (1) (f) we show that the constitutional rights of Petitioner to discharge under the Texas statutes for good conduct, were raised specifically in the trial court in our Motion for Resentencing, as well as in the above-mentioned papers in the Court of Criminal Appeals. The trial court Motion for Resentencing and the memorandum brief submitted to the Trial Court, contemporaneously with the Motion for Resentencing, are copied in Appendix C, post pages 56 to 64.

The trial court was duly impressed with our Motion and granted it, discharging Petitioner.

The Court of Criminal Appeals, as its opinion shows, Appendix A, page 25 post, largely ignored us, ordering Petitioner's re-confinement.

REASONS FOR GRANTING THE WRIT

1. In denying Petitioner leave to Intervene, and in refusing to follow North Carolina v. Pearce, 395 U. S. 711, 719, f. n. 13, the Court of Criminal Appeals denied the equal protection of the laws to Petitioner in a

manner calculated to shake criminal jurisprudence throughout the nation.

The state court has decided these federal questions of substance perhaps not *precisely* already determined by the Supreme Court, but, in any event, in a way probably not in accord with applicable decisions of the Supreme Court, within the meaning of Rule 19, 1 (a). We think there is a direct conflict with *North Carolina v. Pearce*, 395 U. S. 711, 719, f. n. 13.

With respect to the denial of Petitioner's credit for good conduct which had been allowed by the trial Court, the Court of Criminal Appeals completely ignored our argument, and Judge Clawson's attorney's argument that equal protection of the laws demanded Petitioner be given credit. There are two Statutes in Texas regulating credit for good conduct. They are Articles 5118a and 6184 l. Article 5118a relates to "inmates of each county jail," and 6184 l to people in the Penitentiary. Both require a credit of at least one-third of the actual time in custody where there is good conduct. We argued that *Petitioner could not be treated as neither fish nor fowl;* that the fact that he was in county jail, awaiting disposition of his appeal, and neither serving out a misdemeanor charge nor in the penitentiary actually serving out of record his prison sentence, could not constitutionally prevent him from receiving the equal treatment of the laws. Judge Clawson, the trial judge, agreed with us. *The Court of Criminal Appeals, instead, set up a "straw man," saying that the controlling issue was whether Article 5118a could be construed as relating to prisoners convicted of felonies and awaiting their appeals.* Looking to the "fine or jail" terminology in the statute, the Court of

Criminal Appeals "interpreted" the Article as inapplicable to Petitioner. Yet *the Court of Criminal Appeals ignored Article 6184 l and our argument specifically pointing it out.* Appendix B, page 48. It did not even bother to mention *Gilliam v. State* (Tenn. 1939) 126 S. W. (2) 305, which we cited, Appendix B, page 48, and which holds that the prisoner's right to credit cannot be defeated by sending him to jail rather than directly to the penitentiary when convicted of a felony. See also *Fite v. State* (Tenn. 1905), 88 S. W. 941 and *State v. McClellan*, 9 S. W. 233.

Furthermore, although the Court of Criminal Appeals had previously recognized in *Bennett v. State*, 450 S. W. (2) 652, 657, that the time credited "for good behavior" must be subtracted from a sentence, citing *North Carolina v. Pearce*, 395 U. S. 711, 719, f. n. 13, and although in its Opinion it recognized that we had cited *Pearce* to the trial court, it studiously ignored and refused to mention the controlling point that *Pearce*, and the principle mentioned in footnote 13, at 395 U. S. 719, control the basis of this case.

Denial of certiorari here will disturb the whole system of criminal jurisprudence in the United States, because it will persuade State courts to make unwarranted distinctions between jail and prison time.

In short, we think the principles of *Pearce*, while perhaps limited on the facts to inmates of prisons, should under the Constitution be applied to all people imprisoned or incarcerated for, or as a result of, a crime—whether they are in a workhouse, jail, county farm, or a Penitentiary. Criminals are entitled to the equal protection of the laws. *Hill v. Texas*, 316 U. S.

400; *Barbier v. Connolly*, 113 U. S. 27. In the last case the court said: "* * in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offense."

2. The decision below provides for double punishment.

Petitioner having been discharged by a court of competent jurisdiction—even the Court of Criminal Appeals did not attack the jurisdiction of the trial court (only its authority)—it is double punishment, contrary to the Fifth Amendment, to again arrest Petitioner for the same offense, and punish him again. The Fifth Amendment clearly says: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." *Pearce*, we respectfully say, would apply such principle to Petitioner, and those like him. See *Robinson v. Beto*, 426 F. (2) 797. The penumbra of the opinion of the Court of Criminal Appeals, if certiorari be not granted, will confound the judges in every state in the Union.

The Court of Criminal Appeals has begged the question by saying it is enforcing its own jurisdiction. Under the guise of a reformation of sentence, it has no jurisdiction to make an order which is, in effect, the pronouncing of a new sentence. *Meadors v. State*, Tex. Crim. App., 260 S. W. 580. The Court of Criminal Appeals has no jurisdiction with reference to fixing punishment except to see that it was within the power of the jury or court below to assess it. *Harvey v. State*, 201 S. W. (2) 42. Unless a sentence is pronounced validly by the District Court, the Court of

Criminal Appeals has no jurisdiction over the case. The Court of Criminal Appeals in a previous case has already recognized that *North Carolina v. Pearce*, 395 U. S. 711, 719, footnote 13, requires the subtraction by the trial court of "time credited for good behavior." See *Bennett v. State*, at 450 S. W. (2) 652, 657. The District Court of Texas has unparalleled general jurisdiction to fill in any gaps in the law. The Constitution of Texas gives the District Court general jurisdiction "over all causes of action *whatever* for which a remedy or jurisdiction is not provided by law or this Constitution." Texas Constitution, Article 5, Section 8. It has been said that: "*no court of equity in the world, chancery or otherwise, possesses the broad and comprehensive powers to administer equity as the District Courts" of Texas. Fryckberg v. Scott* (Tex. Civ. App.), 218 S. W. 21, 23.

The District Court of Texas therefore had power to apply the equal protection of the laws under the Federal Constitution, 14th Amendment, and also to prevent multiple punishment under the doctrine of *Pearce* and *Robinson v. Beto*, 426 F. (2) 797. See *Arsenault v. Massachusetts*, 393 U. S. 5; *Cochran v. Kansas*, 316 U. S. 255; *Burns v. Ohio*, 360 U. S. 252; *Smith v. Bennett*, 365 U. S. 708; *Ex parte Hull*, 312 U. S. 546.

In Texas, time credited for good behavior is time *earned*. It is not a gift or an act of clemency. *Ex Parte Anderson*, 192 S. W. (2) 280 (Tex. Crim. App. 1946). The trial court found that such time had been earned as a matter of fact. The Court of Criminal Appeals did not disturb this finding of fact. Furthermore, the Court of Criminal Appeals does not have

fact finding jurisdiction. *Ex parte Carlile*, 92 Crim. Rep. Tex., 495, 244 S. W. 611; *Snow v. State*, 134 Tex. Crim. Rep. 263, 114 S. W. (2) 898.

3. The decision below particularly denied equal protection of the laws in permitting an appeal by the State of Texas, when such is prohibited under Texas law.

Article 44.01 of the Texas Code of Criminal Procedure and Article 5, Sec. 26 of the Texas Constitution prohibit an appeal by the State in Criminal cases. Plainly in this case the Court of Criminal Appeals has allowed an appeal. Such is a denial of equal protection as well as due process. The Supreme Court has many times ruled that where the federal or state governments provide for appeals by an accused, discriminatory denial of a statutory right of appeal violates the equal protection clause of the 14th Amendment and the 5th Amendment. *Cochran v. Kansas*, 316 U. S. 255; Antieau, Modern Const. Law Sec. 5:123. It should be equally a denial of equal protection to allow the State to appeal one case when the statutes prohibit its appeals generally. Such discriminates against Petitioner.

4. The Court of Criminal Appeals denied due process to Petitioner by not allowing him a day in court, and by not giving him notice of a proceeding wherein his liberty was directly involved.

The record in this case is a sad demonstration, and a startling one, of the denial by the highest criminal court in Texas of a day in court to a man whose liberty is directly involved. The proceeding below was against the Honorable J. F. Clawson, District Judge,

only; not any notice was given Petitioner. When Petitioner's counsel heard about it (on the same day the show-cause order was served (nighttime) he promptly went the very next day to the Presiding Judge to find out if he could appear and if he could have more time. He was assured he could appear either for the Petitioner or for Judge Clawson, but that he could not have more time. The show cause order had been issued on March 17; it commanded Judge Clawson's appearance two days later and was served on Judge Clawson only. Judge Clawson's attorneys got an extension of two days; that is, at their request, the Court of Criminal Appeals passed the hearing over the week-end (Saturday and Sunday) until the following Monday afternoon at 2:00 p.m.

Petitioner's counsel at 11:00 a.m. on that Monday filed their motion for leave to intervene, motion to postpone, and motion to dismiss on the merits. At 2:00 p.m. the Court of Criminal Appeals assembled, and first-out stated that it was aware of the said motion for leave, motion to postpone and motion to dismiss; and further said that the motion to postpone and dismiss was already overruled and that the motion for leave to intervene would be treated as a motion for appearance amicus curiae, and, as such, granted. Ten minutes were then given Petitioner's counsel to argue, but he was not then allowed to protest or to speak at all when the announcement was made that he could have ten minutes only.

May it please the Court, Petitioner had a right to appear and argue just as much as did Judge Clawson. However necessary it was to protect the dignity of the District Court (for which Petitioner has rever-

ence), and however brilliant was Judge Clawson's argument, as well as his brief, Petitioner was the poor, 20-year-old, whose liberty was at stake, and who had just a few days before been set free by Judge Clawson in a proceeding of which the State had notice, and in which it argued. Since it was Petitioner's liberty which was at stake, we say the Court of Criminal Appeals had no right to ignore Petitioner. *This was not, according to the State, an appellate proceeding;* therefore Petitioner *had the right to be present* and have counsel present with sufficient time permitted so that counsel could be effective.

Procedural due process requires notice and an opportunity to be heard. *Holt v. Virginia*, 381 U. S. 131; *Snyder v. Massachusetts*, 291 U. S. 97; 16 Am. Jur. (2) 941-942.

As is true elsewhere, intervention by a real party in interest is a basic right in Texas. *Chandler v. Fulton*, 10 Tex. 2; *Garner v. Smith*, 40 Tex. 505; 44 Tex. Jur. (2) 197.

Judicial action against the person of an absent party is not due process. *Hansberry v. Lee*, 311 U. S. 32; 16 Am. Jur. (2) 969. No one may be punished without being heard. *Hovey v. Elliott*, 167 U. S. 409. The opportunity to be heard must be granted at a meaningful time, and in a meaningful manner. *Armstrong v. Manzo*, 380 U. S. 545.

We respectfully say that the record here shows that kind of violation of due process which "offends some principle of justice so rooted in the traditions and con-

science of our people as to be ranked as fundamental," as stated in *Snyder*. Likewise, as Justice Frankfurter would say this case offends "moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history." *Solesbee v. Balcom* (1950) 339 U. S. 9 (dissenting)

5. The Court of Criminal Appeals has attempted to insulate its decision from attack here by professing to interpret a State Statute, Article 5118 a, in such a way as to justify its order and protect itself since ordinarily its interpretation of a State statute can not be reviewed; but such attempt must fall because its "interpretation" offends the federal constitution, and particularly the equal protection clause.

The Supreme Court of the United States will, of course, defer to the interpretation of a state statute by the highest court of that state, if possible. See *Bush v. Texas* (1963), 372 U. S. 586. But, in this case, the Court of Criminal Appeals has deliberately ignored Article 6184 l, cited in our Motion to Dismiss before the Court of Criminal Appeals. Appendix B, pages 46-47. The Court of Criminal Appeals says in its opinion: "The real question presented is the trial court's authority to grant any 'good time' credit under the provisions of Article 5118a." With all due respect to the Court of Criminal Appeals, it was deliberately setting up a "straw man" that it could knock down.

The *real question* was the constitutional one of whether, since Articles 5118a and 6184 l both provide for credit of additional time in the case of good conduct, for all prisoners wherever they may be (without

expressly naming people who are awaiting an appeal), the trial court could deny Petitioner's request for credit without denying the equal protection of the laws.

Therefore, we say that Article 5118a must be interpreted to protect Petitioner, to save it from unconstitutionality.

The argument by the Court that the credit provided in the statute, Article 5118 a, is discretionary with the Sheriff must fall, *to save the statute from unconstitutionality.* Article 6184 l says that the credit "shall" be given. Therefore the use of the word "may" in Article 5118a must be treated as "shall." Otherwise, unlimited and unconstitutional discretion is given an administrator, violating the prohibition against delegation of legislative power. *Fite v. State* (Tenn. 1905) 88 S. W. 941. It is settled in Texas that the Legislature cannot delegate its power without at the same time setting up some reasonable standard for the administrator to follow: *Southwest Savings & Loan v. Faulkner* (Texas Sup. Ct.) 331 S. W. (2) 917; *Nichols v. Dallas*, 347 S. W. (2) 326.

Of course, the discretion argument must fall for another reason. The Sheriff kept no records; the conduct must be presumed to have been good. Parol evidence of misconduct is inadmissible. 72 C. J. S. 886. See *Gilliam v. State* (Tenn. 1939) 126 S. W. (2) 305; *State v. McClellan*, 9 S. W. 233.

Statutes providing for commutation must be construed if possible to grant commutation as a matter of right; not as a favor. 41 Am. Jur. 916. The pris-

oner is always entitled to release at the earliest possible moment under such statutes. 72 C. J. S. 886.

CONCLUSION

Petitioner prays that Writ of Certiorari issue to the Court of Criminal Appeals of Texas and that general relief be granted in the discretion of the Court.

Respectfully submitted,

DAVID L. TISINGER
402 First National Life Building
702 Colorado
Austin, Texas 78701
Attorney for Appellant

APPENDIX A

STATE OF TEXAS, ex. rel.

Leslie B. Vance,

District Attorney

52nd Judicial District, Relator

NO. 44,043 Vs. Original Application

J. F. Clawson, Jr., Judge

169th Judicial District Court

sitting as Judge for the

52nd Judicial District Court, Respondent

OPINION

This is an action seeking the issuance of Writ of Prohibition against the respondent J. F. Clawson, Jr., Judge of the 169th Judicial District Court of Bell County, Texas.

Leave to file the application for writ of prohibition was granted and the application is before this court upon petition and answer supported by brief and oral argument.

The record reflects that one Johnnie Pruett was indicted in Coryell County on April 15, 1969, for the offense of sodomy alleged to have occurred "on or about" April 11, 1969.

On July 25, 1969, Pruett waived trial by jury and entered a plea of nolo contendere before the 52nd Judicial District Court to the charge against him. His punishment was assessed at two years' confinement in the Texas Department of Corrections. On September 3, 1969, he was formally sentenced. At such time the trial judge gave him credit on his sentence from July 25, 1969, for some of the time spent in custody prior to sentence. Notice of appeal was then given.

Pruett's conviction was affirmed on appeal, 463 S. W. 2d 191, with this court upholding the constitutionality of Article 524, V.A.P.C., as to forcible sodomy despite the holding in Buchanan et al. v. Batchelor, et al., 308 F. Supp. 729, that such statute was "void on its face for constitutional overbreath." This court relied in part upon Lawrence v. Woods, 8 Cr.L. 2084, as "recent authority to support the view that state courts are not bound by the rulings of lower Federal courts. . . ."

After the motion for rehearing and a temporary stay of mandate at Pruett's request the mandate of this court was issued on March 3, 1971, commanding the trial court "to observe the order of our said Court of Criminal Appeals in this behalf and in all things to have it duly recognized, obeyed and executed."

Thereafter Pruett's attorney filed a motion seeking credit upon such sentence for the time Pruett had lain in jail pending appeal. Such motion was presented to the respondent Clawson, Judge of the 169th Judicial District Court sitting in the 52nd Judicial District

Court of Coryell County by administrative assignment.

A brief was apparently offered in support of such motion citing Articles 42.03 and 42.09, V.A.C.C.P.; North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656; Robinson v. Beto, 5 Cir., 426 F.2d 797, and this court's decision in Ex parte Griffith, 457 S.W. 2d 60. The brief also urged Pruett be given additional credit on his sentence under the provisions of Article 5118a, V.A.C.S. Testimony was then offered in support of such motion which reflected that Pruett had been in custody under the indictment in question since April 15, 1969.

At the conclusion of the hearing the respondent Clawson noted that on the date of the hearing (March 8, 1971) Pruett was entitled to credit for or to have subtracted from his two year sentence "19 months and 14 days spent in jail pending appeal."[1] In addition the trial court concluded Pruett was entitled to "good time credit equal to 1/3 of the days actually served in jail in the amount of 6 months and 24 days." See Article 5118a, V.A.C.S.

The trial court in its order then "subtracted" the 19 months and 14 days from the original sentence leaving 4 months and 16 days on the original sentence which, "after allowing 'good time' credit of 6 months

[1]This figure was apparently arrived at by considering the 39 days of pre-sentence custody for which Pruett had been given credit at the time of sentence on September 3, 1969, the 18 months from the date of sentence to date of the mandate (March 3, 1971) and the 5 days intervening between date of mandate and the hearing in question.

and 24 days" the court "considered" the original sentence "fully served." Pruett was then ordered "released and discharged from custody."

Nothing in the record before us reflects that at that particular time the relator objected to or protested the respondent's actions.

At the outset there can be no question but that Pruett was entitled to the pre-sentence custody credit granted him at the time of his sentence. See Article 42.03, V.A.C.C.P.; Gremillion v. Henderson, 5 Cir., 425 F.2d 1293; Ex parte Griffith, 457 S.W. 2d 60. And such credit is not lost by the fact that notice of appeal is given. Ex parte Griffith, supra. However, the sentencing judge having exercised his discretion to give credit for all or a part of a defendant's pre-sentence custody, another judge, even one sitting in the same court, may not after conviction again exercise discretion as to pre-sentence custody. Ex parte Washburn, 459 S.W. 2d 637.

And it is true that under the decision of this court in Ex parte Griffith, supra, the trial court had not only the right but the duty to grant to Pruett credit for the 18 months he had lain in jail pending appeal.

And under the provisions of Article 42.09, V.A.C.C.P., where an appeal has been taken and the defendant is in custody, the sentence begins to run on the date of the mandate. Therefore there is no question that Pruett was entitled to the 5 day credit from March 3 to March 8, 1971, even without court order.

There can be then no quarrel with the 19 months and 14 days credit granted Pruett by the respondent.

The real question presented is the trial court's authority to grant any "good time" credit under the provisions of Article 5118a, V.A.C.S., and then to order Pruett's release.

Such statute provides:

> "In order to encourage county jail discipline, a distinction may be made in the terms of prisoners so as to extend to all such as are orderly, industrious and obedient, comforts and privileges according to their deserts; the reward to be bestowed on prisoners for good conduct shall consist of such relaxation of strict county jail rules, and extension of social privileges as may be consistent with proper discipline. Commutation of time for good conduct, industry and obedience may be granted the inmates of each county jail by the sheriff in charge. A deduction in time not to exceed one third (1/3) of the original sentence may be made from the term or terms of sentences when no charge of misconduct has been sustained against the prisoner. This Act shall be applicable regardless of whether the judgment of conviction is a fine or jail sentence or a combination of jail sentence and fine. A prisoner under two (2) or more cumulative sentences shall be allowed commutation as if they were all one sentence. For such sustained charge of misconduct in violation of any rule known to the prisoner (including escape or attempt to escape) any part or all of the commutation which shall have accrued in favor of the prisoner to the date of said misconduct may be forfeited and taken away by the sheriff. No other time allowance or credits in addition to the commutation of time for good conduct herein provided

for may be deducted from the term or terms of sentences. The sheriff shall keep or cause to be kept a conduct record in card or ledger form and a calendar card on each inmate showing all forfeitures of commutation time and the reasons therefor."

Such statute was first enacted in 1955 and was amended in 1963 following Attorney General's Opinion WW 1326 (May 2, 1962) which held that the act had no application to jail prisoners whose sole punishment consisted of a fine and court costs and who is "laying out" such fine and costs. See Article 45.53 (former Art. 920), V.A.C.C.P.

It is clear from the history and the wording of the present statute that the same is applicable only to misdemeanor "terms of prisoners . . . . regardless of whether the judgment of conviction is a fine or jail sentence or a combination of jail sentence and fine." Attorney General's Opinion C-310 (Sept. 17, 1964) expressly held that Article 5118a, supra, had no application "to a prisoner incarcerated in county jail under a sentence calling for imprisonment in the penitentiary. . . ."

In the case at bar the punishment assessed does not consist of a term in the county jail but of a felony sentence to be served in the Texas Department of Corrections. In cases where, following a felony conviction, a prisoner is confined in jail pending appeal because of financial inability to make an appeal bond or where the punishment is in excess of 15 years (Article 44.04, V.A.C.C.P.), such prisoner is not serving a

"term" in the county jail so as to render the provisions of Article 5118a, supra, applicable.[2]

Even if this were not so, there is another reason why Article 5118a, supra, is not applicable in the case at bar. Such statute provides that the sheriff shall have the sole discretion in granting commutation of time of those prisoners in his custody serving jail terms in the county jail. See Attorney General's Opinion C-310, supra. In Attorney General's Opinion WW 1326, supra, it was written: "The judge of the court in which the prisoner was convicted has no powers of authority under Article 5118a, V.A.C.S."

At the hearing on the motion for credit on the sentence following receipt of this court's mandate Sheriff Cummings of Coryell County testified he had not kept a conduct record card or ledger on Pruett, and it appears the sheriff made no effort to grant Pruett any commutation of his time or expressed any desire to do so. In fact, Attorney General's Opinion C-310, supra, holds that the sheriff cannot make any commutation of a felony sentence.

Having thus determined that the trial judge had no authority to grant credit under the provisions of Article 5118a, V.A.C.S., and to that extent that his order is void, we next turn to the question of whether a writ of prohibition will lie under the circumstances described.

---

[2]In view of Pruett's sentence of two years' confinement in the Texas Department of Corrections he could have at any time upon making the requisite appeal bond ended his confinement or "term" in the county jail.

"The Court of Criminal Appeals is the court of last resort in this state in criminal matters. This being so, no other court of this state has authority to overrule or circumvent its decisions, or disobey its mandates." State ex rel. Wilson v. Briggs, 351 S.W. 2d 892, 894.

The Constitution of this state, Article V, Sec. 5, provides that this court and the judges thereof "shall have the power to issue the writ of habeas corpus, and under such regulations as may be prescribed by law, *issue such writs as may be necessary to enforce its own jurisdiction.*" (emphasis supplied)

There can be no question that this court may issue a writ of prohibition in those cases in which is it necessary to enforce its jurisdiction. 46 Tex.Jur.2d, Prohibition, Sec. 11, p. 460; State ex rel. McNamara v. Clark, 187 S.W. 760; Gooch v. Fuchs, 339 S.W.2d 202; State ex rel. Wilson v. Briggs, supra; State v. Klein, 224 S.W. 2d 250.

But we must determine whether the issuance of such writ is applicable under the facts presented by the case at bar.

It has been said that "a writ of prohibition is that process by which a superior court prevents inferior courts, tribunals, officers, or persons from usurping or exercising jurisdiction with which they have not been vested." 73 C.J.S., Prohibition, Sec. 1, p. 9.

It is noted though that "Prohibition issues to prevent the commission of a future act and not to undo, nullify, or review an act already performed; it will

not be granted when the act sought to be prevented is already done, but will lie when such act is not a full, complete and accomplished judicial act." 73 C.J.S., Prohibition, Sec. 10c, p. 30.

Since, in the case at bar, the respondent Clawson has granted Pruett credit under the provisions of Article 5118a, supra, and released him by order of court, it is clear that the act sought to be prevented is already an accomplished fact. Under these circumstances, we conclude prohibition is not the proper remedy.

In determining whether the issuance of a writ is necessary to protect its jurisdiction this court will not, however, be delimited by the denomination of the pleadings by the relator. The court will look to the essence of the pleadings, including the prayers therein as well as the record before the court. When that is done in this case it is apparent that relator is not seeking to restrain future acts but seeking to have this court direct the respondent Clawson to set aside an order already entered insofar as said order is invalid. Thus it is apparent that the relator is in fact seeking a writ of mandamus.[3]

We conclude that the issuance of a writ of mandamus is necessary in order to protect this court's jurisdiction and to insure that the mandate of this court not be thwarted and the relator has no other adequate remedy.

---

[3]"A writ of prohibition has many of the characteristics of a writ of mandamus, except that the latter commands the performance of an act, whereas the former restrains its performance." 46 Tex.Jur.2d, Prohibition, Sec. 2, p. 446.

The respondent is directed to set aside that portion of the order granting Pruett "good time" credit on his sentence under Article 5118a, supra, to issue a capias for Pruett's arrest (Cf. Article 44.05, V.A.C.C.P.) and to perform the ministerial duty of carrying out the mandate of this court.

We assume that the respondent will immediately perform his duty as herein set out. Writ of mandamus will issue only if he refuses to do so.

No motion for rehearing will be entertained.

It is so ordered.

Onion, Presiding Judge

(Delivered March 31, 1971)

Roberts, J., not participating.

APPENDIX A-1

CLERK'S OFFICE

COURT OF CRIMINAL APPEALS OF TEXAS

I, GLENN HAYNES, Clerk of the Court of Criminal appeals of Texas, do hereby certify that the following announcement was made from the Bench of the Court of Criminal Appeals on March 22, 1971 as follows:

> I think at the outset that we should announce that the Court is aware of the motion for postponement and motion to dismiss which has been filed by Intervenor and said motions will be denied and overruled. However, the motion for leave to intervene will be considered as a request for amicus curiae and will be granted.

in Cause No. 44,043 and styled;

> State of Texas ex rel Leslie B. Vance, District Attorney 52nd Judicial District Court of Coryell County
>
> vs.
>
> J. F. Clawson, Jr., Judge, 169th Judicial District Court sitting in the 52nd Judicial District Court of Coryell County

WITNESS, my hand and the Seal of the Court at Austin, Texas, this *1st* day of April, A. D. 1971.

GLENN HAYNES, CLERK

COURT OF CRIMINAL APPEALS OF TEXAS

APPENDIX B

"NO. 44,043

"IN THE COURT OF CRIMINAL APPEALS"
AUSTIN, TEXAS

"STATE OF TEXAS ex rel

LESLIE B. VANCE, DISTRICT ATTORNEY
52ND JUDICIAL DISTRICT

CORYELL COUNTY, TEXAS, RELATOR

VS

J. F. CLAWSON, JR., JUDGE
Sitting for the 52nd Judicial District Court
RESPONDENT

"MOTION FOR LEAVE TO INTERVENE BY JOHNNIE PRUETT

"TO SAID HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

"Now comes Johnnie Pruett, the person who is alleged by Relator to have been improvidently released from custody, and shows unto the Court that he is a

real party in interest, *his civil and Constitutional rights being at stake*, as well as his liberty, and begs leave to intervene, offer evidence, present motions and arguments, and have the proceedings herein transcribed by a Court Reporter (without expense to the Court). (italics supplied)

Burrell Johnston
1108 Nueces
Austin, Texas 78701

Stayton, Maloney, Black, Hearne & Babb
By Frank Maloney
Capital National Bank Building
Austin, Texas 78701

David L. Tisinger
404 First National Life Building
Austin, Texas 78701

ATTORNEYS FOR JOHNNIE PRUETT

Filed in

Court of Criminal Appeals
Mar 22 1971
Glenn Haynes, Clerk

"NO. 44,043

"IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

"STATE OF TEXAS, ex rel
LESLIE B. VANCE, DISTRICT ATTORNEY,
Relator

VS

J. F. CLAWSON, JR., JUDGE
Sitting for the 52nd Judicial District Court,
Respondent

Motion for Postponement by Johnnie Pruett

"TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Now comes Intervenor, Johnnie Pruett, and respectfully moves for a postponement herein, showing:

1.

"Intervenor was not served with any official notice of this proceeding. His attorneys first learned of same at 7:00 p.m. March 17, 1971, and were unable to get copies of the papers filed herein until 1:00 p.m. March 18, 1971. The setting for Monday, March 22, 1971, was made without the knowledge of or consent of Intervenor, or his attorneys.

2.

"In view of the grave questions involved, which directly concern Intervenor's liberty, and in view of the minimal inconvenience to the State, this matter should be postponed at least ten days in order that counsel may adequately prepare Intervenor's pleadings and motions, as well as arguments. Counsel have not had adequate time at this stage in spite of the utmost diligence.

3.

"*Intervenor respectfully says that the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States require that his counsel have at least ten more days for adequate preparation.* (italics supplied)

4.

"After approval of the record by the trial Court in cause no. 43,193, Pruett v. State, which approval required many months after preparation, the appellate processes before this Court required, as the Court judicially knows, an additional period of many months, and Intervenor was in the County jail for 22 months, a longer period than he presumably would have been required to serve had he gone on to the Penitentiary. His pre-sentence time in jail was only 4 months. His appeal to the United States Supreme Court is still pending in cause No. 1390 in that Court, although stays have been denied him—we think out of respect

to the decision by this Court not to grant further stay of the mandate.

5.

"In view of the questions involved, and allegations made, an additional delay of ten days will not hurt the State nor the Respondent.

"WHEREFORE, Intervenor prays that this cause be postponed for a period of at least ten days and for general relief, and that, in any event, counsel be allowed ten days after submission to file briefs herein.

Burrell Johnston
1108 Nueces
Austin, Texas 78701

Stayton, Maloney, Black, Hearne & Babb
By Frank Maloney
Capital National Bank Building
Austin, Texas 78701

David L. Tisinger
404 First National Life Building
Austin, Texas 78701

ATTORNEYS FOR INTERVENOR JOHNNIE PRUETT

Filed in
Court of Criminal Appeals
Mar 22 1971
Glenn Haynes, Clerk

"STATE OF TEXAS
COUNTY OF TRAVIS

"Before me, the undersigned authority, on this day personally appeared David L. Tisinger, who, being by me duly sworn, upon his oath deposed and said that the facts stated in the above and foregoing Motion for Postponement by Johnny Pruett are true and correct.

David L. Tisinger
404 First National Life Building
Austin, Texas
78701

"Sworn to and subscribed before me this the 22nd day of March, 1971, to certify which witness my hand and seal of office.

D. J. Hardwick
Notary Public Travis County,
Texas

A True Copy

Attest:

Glenn Haynes, Clerk
Court of Criminal Appeals of Texas
By Tony Bennett
Deputy

"No. 44,043

"IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

AUSTIN, TEXAS

"STATE OF TEXAS, ex rel
LESLIE B. VANCE, DISTRICT ATTORNEY,
Relator

VS

J. F. CLAWSON, JR., Judge
Stting for the 52nd Judicial District Court,
Respondent

"INTERVENOR'S MOTION TO DISMISS

"TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

"Now comes the Intervenor, Johnnie Pruett, and respectfully moves, subject to his Motion for Postponement, upon which he still insists and relies, that the Petition for Writ of Prohibition be dismissed, and in the alternative denied, showing:

1.

"The Court of Criminal Appeals is without jurisdiction to issue the writ, because:

"(1) Issuance of such would allow the State to appeal, contrary to Article 44.01 of the Code of Criminal Procedure, and contrary to Article 5, Sec. 26, of the Constitution of the State of Texas, and *would thereby deny to Intervenor due process of the laws as guaranteed by the 5th and 14th Amendments to the Constitution of the United States.* See *Dewberry v. State*, 283 S. W. (2) 399 (italics supplied)

"(2) The Court of Criminal Appeals has authority to issue such a writ to enforce, but only to enforce, its jurisdiction. Ex parte *Rubison*, 340 S. W. (2) 815 (1960); Ex parte *Minor* 27 S. W. (2) 805; Ex parte *Newsom*, 143 S. W. (2) 956; *Hogan v. Turland*, 430 S. W. (2) 720, no writ history; Ex parte *Martinez*, 145 S. W. 959; Ex parte *Hageler*, 28 S. W. (2) 550. *Cf.*, *State v. Jones*, 395 S. W. (2) 612.

Filed in
Court of Criminal Appeals
Mar 22 1971
Glenn Haynes, Clerk

"The Court, under the guise of reforming a sentence, can not make an order which would be in effect pronouncing a sentence. *Meadors v. State*, 260 S. W.

580. The Court has no responsibility in fixing punishment except to see that it was within the power of the jury to assess it. Harvey v. State, 201 S. W. (2) 42. Unless a sentence is pronounced validly by the District Court, the Court of Criminal Appeals has no jurisdiction over the case.

"(3) Jurisdiction to sentence or resentence is given only to the District Court. Article 42.03 of the Code of Criminal Procedure expressly gives jurisdiction to resentence, after issuance of the mandate of the Court of Criminal Appeals, to the District Court. The jurisdiction given by said Article is not to perform a ministerial function but to exercise judicial discretion, find the facts, and subtract at the very least the time spent in jail pending appeal. Ex parte *Griffith* (Tex. Cr. Ap.) 457 S. W. (2) 60. According to *North Carolina v. Pearce*, 395 U. S. 711, 89 S. Ct. 2072, the time subtracted must be all of the time in jail, and credit "for punishment already endured" must be fully subtracted. 89 Sup. Ct. 2072, 2077. The time subtracted must also include time "credited for good behavior." (89 Sup. Ct. 2077, footnote 13, recognized by Judge Onion in *Bennett v. State*, at 450 S. W. (2) 652-657.

"We think that the Statutes of Texas so delimit the jurisdiction of the Court of Criminal Appeals that it does not have jurisdiction to resentence Pruett, and therefore it does not have jurisdiction to enter the additional credit for good conduct required by the Supreme Court in *Pearce*. What Court then has jurisdiction? Only the District Court, because the Constitution of Texas gives the District Court general jurisdiction "over all causes of action *whatever* for

which a remedy or jurisdiction is not provided by law or this Constitution . . ." This is the exact language of the Texas Constitution, Article 5, Section 8.

"(4) We are mindful of *State v. Klein*, 224 S. W. (2) 250; Ex Parte *Massie*, 278 S. W. (2) 851; and State, ex rel *Wilson v. Briggs*, 351 S. W. (2) 892. Such cases involved *suspension* of the sentences imposed by this Court through affirmance, and thus interference with the jurisdiction of this Court. But Judge Clawson made no attempt to suspend the previous sentence. He simply subtracted the credits which in his judicial opinion were proper. To do this he exercised fact-finding jurisdiction, which this Court does not have. To do this, he obeyed the mandate of *Pearce* and *Ex Parte Griffith*. See Judge Onion's opinion in the latter case at 457 S. W. (2) 64, where he said: "Here the procedure does not involve merely granting credit on the sentence, but calls for the defendant to be again brought before the trial court to be re-sentenced with the judge actually subtracting from the original sentence the time the defendant has lain in jail pending the appeal."

"Judge Clawson therefore did not interfere with the jurisdiction of this Court; he followed the mandate of the Statute. We think he erred in not crediting presentence time; the Statute does not prevent or prohibit a District Judge from so doing, especially if constitutional reasons are present. See note 3, Ex Parte *Griffith*, 457 S. W. (2) 65.

2.

"Judge Clawson properly discharged Pruett, after allowing the proper credits, because:

"(1) Not to discharge Pruett after recognizing that the sentence was served would have constituted an abdication from Judge Clawson's duty under Article 5, Section 8, of the Constitution, and would have meant that the State was exacting vengeance, rather than punishment. We think that is what the State is trying to do now—exact vengeance. Everyone knows that the boy has served longer than he would have had to serve in the Pen. Does the State simply want to put the boy to the stigma of a day or two inside the facilities of the Department of Corrections?

"If the State says that only the Department of Corrections or some officer under Article 6184 l could judge the time for good conduct, it meets itself coming back. Its officers were not in charge of the jail, and could not testify to conduct or bad conduct. Only the Sheriff could testify on this. He did, and the only judicial officer empowered by the laws of Texas to hear his testimony was Judge Clawson, or an assigned District Judge.

"(2) Article 5118a requires a credit of 1/3 of the time for good conduct. This applies, the way the statute is written, to "inmates of each county jail." Such statute does not exclude felons. Article 6184 l grants 20 days per month for Class 1 prisoners, and ten days per month for all Class II prisoners. Credit under either theory under either statute would grant Pruett sufficient time to require his release. Both statutes require that a card or ledger be kept together with a calendar card showing all forfeitures of commutation of time and *reasons* therefor.

'No card and no ledger was kept of Johnnie Pruett,

and therefore it must be conclusively presumed that "no charge of misconduct" was sustained against him. We found no Texas case on this point, but the authorities outside of Texas are clear, and apparently without conflict, that such presumption of good conduct *must* be indulged, and that parol evidence of misconduct is inadmissible. 72 C.J.S. 886. Such was the exact holding in two Tennessee cases, *Gilliam v. State* (Tenn. 1939) 126 S. W. (2) 305, and *State v. McLellan*, 9 S. W. 233.

"Insofar as it may be argued that the Sheriff's statutory authority under Article 5118a to deny commutation is discretionary with him, we reply that such *construction is to impute an unconstitutional delegation of legislative power to him.* This was the exact holding in *Fite v. State* (Tenn. 1905) 88 S. W. 941. And it is settled in Texas that the Legislature can not delegate its power without at the same time setting up some reasonable standard for the administrator to follow: 53 Tex. Jur. (2) 66; 12 Tex. Jur. (2) 406; 12 Tex. Jur. (2) 410; 1 Tex. Jur. (2) 651. (italics supplied)

"The legislator must fix a reasonable standard for the administrator to follow: *Southwest Savings & Loan v. Faulkner* (Tex. Sup. Ct.), 331 S. W. (2) 917; *Nichols v. Dallas*, 347 S. W. (2) 326. Standards were set for the Sheriff, but he did not follow them.

"Article 6184 l requires the credit set forth therein and says it "shall" be allowed. The fact that Article 5119a uses the word "may" must be ignored, because to allow unlimited discretion is to allow an invasion of legislative powers, and "may" *must also be ignored*

for constitutional reasons. It would deny the equal protection clause of the United States Constitution to say that felons in the pen must be granted credits, but that felons in county jail need not be. Likewise, it would be unconstitutional argument to say that Johnnie Pruett has been neither fish nor fowl because he is not in the penitentiary and he is not in the class of county jail inmates contemplated by Article 5118a. (italics supplied). Such was the holding in *Gilliam v. State* (Tenn. 1939), 126 S. W. (2) 305, where the offense was a felony but the trial judge in his discretion sentenced the prisoner to the County Workhouse, as the statute permitted. If the prisoner had been sent on to the Pen he would have received credits under the penitentiary code. The workhouse statute did not provide for record keeping, as did the penitentiary statute. The Court held that the prisoner's right to credit could not be defeated by sending him to the workhouse, and that the statute providing for credits was a part of his sentence, and, furthermore, that the failure of the county workhouse administrator to keep records, saying whether the prisoner had shown good conduct, or bad conduct, did not prevent the court, in the absence of such records, from presuming that the conduct was good.

"The Courts construe the statutes if possible as entitling a prisoner to commutation as a matter of right, and not as a favor. 41 Am. Jur. 916. Where statutes on the subject are capable of two constructions, that construction is favored which would entitle the prisoner to release and discharge at the earliest possible time. 72 C. J. S. 886.

"(3) In aid of the validity of Judge Clawson's order,

we say that the pre-sentence time should have been credited. Judge Clawson did not do this, out of deference to the trial judge who entered the original order which allowed credit of pre-sentence time only back to July 25. *However, under the rule of the Pearce case, and Robinson v. Beto, 426 F (2) 797, surely the pre-sentence time was punishment which constitutionally must be credited.* (italics supplied) It is playing with words, it is making a distinction without a difference, to distinguish between pre-sentence time and post-sentence time. The reasoning behind both of the cases just mentioned is that to leave it discretionary with the judge whether jail time will be subtracted is to deter a defendant from appealing out of fear that it will cost him time if his appeal is unsuccessful; and that such deterrence is a denial of due process. It is just as unfair for the trial judge to deny pre-sentence as post-sentence time. Once pre-sentence time is denied the defendant is impeded in the free choice of making an appeal because he knows that his total time is already not to be credited, and that it may better behoove him to forego an appeal in the hope of more quickly getting a parole or otherwise being discharged from the Penitentiary.

"Judge Onion may well have had this in mind. See footnote 3 at 457 S. W. (2) 66. In this connection, we would point out that *Gremillion v. Henderson*, 425 F (2) 1293, cited by Judge Onion in said footnote was decided a few days prior to *Robinson*, and it did not involve the situation of an appeal, so that deterrence of an appeal was not possibly involved.

"It is only reasonable to say that denial of pre-sentence time deters an appeal because the prisoner looks

forward with real fear that he may have to spend more time in jail with an appeal than without it; *this is the thing declared unreasonable in Robinson, and also unconstitutional where the Court said: "defendant's right of appeal must be free and unfettered."* (426 F. (2) 798). *Pearce says "punishment already endured must be fully subtracted."* 89 S. Ct. 2072, 2077. (italics supplied)

"We respectfully disagree with Judge Onion's statement in *Bennett v. State*, 450 S. W. (2) 652, 657 that the *Pearce* case refers only to time in *prison*. We respectfully submit that to the public and to the prisoner it makes no difference whether the incarceration is prior to the sentence because the prisoner can not make bond, or whether it is after the sentence.

"Alternative Plea for Relief Here

In the event that the Court feels here that we are wrong and that Judge Clawson should not have entered the Order of discharge; we respectfully ask the Court of Criminal Appeals to enter an order now of discharge. If the Court of Criminal Appeals has jurisdiction, and if Judge Clawson did not, the same arguments under statutory and constitutional law, which we have made in the foregoing pages, we humbly submit, compel the discharge of the prisoner. (italics supplied)

"WHEREFORE, Intervenor prays that the Petition for Writ of Prohibition be dismissed or denied, and in the alternative that the Court here order that Pruett's

liberty be left unimpaired and that he be declared legally free, and for general relief.

Burrell Johnston
108 Nueces
Austin, Texas 78701

Stayton, Maloney, Black, Hearne
& Babb
By Frank Maloney
Capital Nat. Bank Bldg.
Austin, Texas 78701

David L. Tisinger
404 First National Life Building
Austin, Texas 78701

ATTORNEYS FOR INTERVENOR

A True Copy

Attest:

Glenn Haynes, Clerk
Court of Criminal Appeals of Texas
By Tony Bennett
Deputy

"No. 44,043

"IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

"STATE OF TEXAS ex rel
LESLIE B. VANCE, DISTRICT ATTORNEY
52ND JUDICIAL DISTRICT
CORYELL COUNY, TEXAS, RELATOR

VS

J. F. CLAWSON, JR., JUDGE
(Sitting for the 52nd Judicial District Court)

"APPLICATION BY JOHNNIE PRUETT

FOR STAY OF WRIT OF MANDAMUS AND ANY OTHER PROCEEDINGS HEREIN EXCEPT TO DIRECT RESPONDENT TO WITHHOLD ISSUING ANY CAPIAS OR OTHER PAPER PENDING APPLICATION BY PRUETT FOR RELIEF IN FEDERAL COURTS

"TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Now comes Johnnie Pruett and moves the Court to stay any enforcement of its Order of March 31, 1971, and to direct Respondent J. F. Clawson to take no steps toward issuance of any capias or other writ against Johnnie Pruett, pending allowance of thirty

days for Johnnie Pruett to appeal to the United States Supreme Court, the District Court for the Western District of Texas, and the United States Circuit Court of Appeals for the Fifth Circuit, if necessary, and pending applications for appropriate stays in such Courts of this Court's Order of March 31, 1971, and in support hereof shows:

"*This Honorable Court has denied said Johnnie Pruett his rights under the First, Fifth and Fourteenth Amendments, U. S. Constitution, in that:*

"*First:* This Honorable Court has denied *procedural due process to Johnnie Pruett, attempted Intervenor and Amicus Curiae, in:* (italics supplied)

"(a) Setting this case for hearing without any notice to Pruett only 5 days after the filing of the Petition by Relator, with two of such 5 days being holidays;

"(b) In overruling Pruett's Motion to Intervene;

"(c) In overruling Pruett's Motion for Postponement;

"(d) In allowing Pruett's attorneys to appear only as Amicus Curiae, and in allowing them only ten minutes to argue the grave constitutional questions involved;

"(e) In allowing the State to Appeal by this means the Order of Judge J. F. Clawson, dated March 8, 1971, in Cause No. 6522 in the 52nd Judicial District Court of Coryell County Texas

Second: *This Honorable Court has denied substantive due process and the equal protection of the laws in destroying Pruett's vested liberty, and subjecting him to double jeopardy.* (italics supplied)

Third: *This Honorable Court has denied substantive due process, the equal protection of the laws, and civil rights to Johnnie Pruett, by refusing to allow him credit for all his time in jail, by basing such refusal on an interpretation of Artitle 5118 a, whilst at the same time refusing to recognize that Article 6184 l would require an equal credit,* under *North Carolina v. Pearce*, 395 U. S. 711, and *Robinson v. Beto*, 426 Fed. (2) 797. (italics supplied)

Fourth: *This Honorable Court has denied equal protection of the laws by refusing to allow the exercise of judicial discretion by Judge Clawson.*

"Relief will be sought in Federal Courts immediately, but immediate enforcement by this Court will make matters partially moot.

"Johnny Pruett here humbly beseeches the Court that at least he should be entitled to present the questions here involved to the Federal Courts; such will not hurt anyone. In fact, it may be helpful to the jurisprudence of Texas.

"WHEREFORE, Johnny Pruett, Amicus Curiae, and the undersigned attorneys most respectfully pray

that all action in this case be stayed for thirty days pending efforts to get this case heard by the Federal Courts, except that Respondent Clawson should be instructed to hold up the issuance of any capias or the taking of any action looking toward the arrest of Johnny Pruett, pending said thirty day period.

Burrell D. Johnston
1108 Nueces
Austin, Texas 78701

Stayton, Maloney, Black, Hearne & Babb
By Frank Maloney
Capital National Bank Bldg.
Austin

David L. Tisinger
404 First National Life Bldg.
Austin, Texas

Attorneys for Johnnie Pruett

STATE OF TEXAS
COUNTY OF TRAVIS

Before me, the undersigned authority, on this day personally appear David L. Tisinger, who, being of me duly sworn, upon his oath deposed and said that the facts stated above are true.

David L. Tisinger

Sworn to and subscribed before me this the 31st day of March, 1961, to certify which witness my hand and seal of office.

Betty Slaughter
Notary Public Travis County, Texas

APPENDIX C

"No. 6522

"THE STATE OF TEXAS
v
JOHNNIE PRUETT

IN THE DISTRICT COURT
OF CORYELL COUNTY
52ND DISTRICT

"MOTION OF DEFENDANT FOR RESENTENCING AND FOR PROPER CREDIT UPON HIS TIME IN JAIL

"TO THE HONORABLE JUDGE OF SAID COURT:

"Now comes the Defendant, Johnnie Pruett, and moves for resentencing pursuant to Art. 42.03, 42.09 and related sections of the Code of Criminal Procedure, and shows unto the Court:

1.

"Defendant has been continuously in County Jail in this County of Coryell since April, 1969, and, since his original sentence herein in July 1969 he has not only been continuously in such jail but has been appealing his conviction herein to the Court of Criminal Appeals;

2.

"His case is now on appeal to the Supreme Court of

the United States, being Cause No. 1390, styled Pruett v. The State of Texas.

3.

"However, pending the appeal to the U. S. Supreme Court, it may be that a mandate of affirmance of Defendant's conviction will shortly issue from the Court of Criminal Appeals; and, in anticipation of such mandate, Defendant moves for re-sentencing and credit of his jail time pursuant to the above statutes, *and pursuant to the doctrines of Robinson v. Beto, 426 Fed. (2) 797 (1970) and Ex parte Griffith, 457 S. W. (2) 60 (Ct. Cr. App. Tex. 1970), shows that he has a constitutional right to credit of his jail time.* (italics supplied)

4.

"Defendant says that the Court should direct the Sheriff to bring Defendant before the Court for this re-sentencing and that the Sheriff should be required to disclose the amount of Defendant's jail time for the record.

5.

"Defendant says, that in all equity, in view of the fact that he has been in jail nearly 22 months, and his sentence is only 24 months, the Court should release Defendant on his own recognizance or allow Defendant to serve out his term on week-ends, or that he have his sentence reduced and discharged.

"Wherefore, Defendant prays that he be brought

before the Court for re-sentencing, that his jail time be credited upon the mandate and commitment, and in the alternative that he be released on his own recognizance to serve out his term on week-ends, or that he have his sentence reduced and that he be discharged, and for general relief under the statutes of the State of Texas.

David L. Tisinger
404 First National Life Building
Austin, Texas 78701
Attorney for Defendant
No. 6522

"THE STATE OF TEXAS
VS
JOHNNIE PRUETT

IN THE DISTRICT COURT
CORYELL COUNTY, TEXAS
52ND JUDICIAL DISTRICT

"DEFENDANT'S MEMORANDUM BRIEF ON MOTION FOR RESENTENCING AND DISCHARGE

TO SAID HONORABLE COURT:

"The following authorities are informally submitted.

Credit for Defendant's Jail Time Should Be Allowed 100%.

"*North Carolina v. Pearce*, 395 U. S. 711, 89 S. Ct. 2072, 23 L. Ed. (2d) 707

Robinson v. Beto, 426 F (2d) 797 (1970)
Ex Parte Griffith (Tex. Cr. App.), 457 S. W. (2) 60
Bennett v. State (Tex. Cr. App.) 450 S. W. (2) 652

"In the *Pearce* case, just cited above, *the Supreme Court of the United States said that credit must be given "for punishment already endured"; and that such must "be fully subtracted." 89 Sup. Ct. 2072, 2077. The Court in that case also said that the time subtracted must also include the time "credited for good behavior."* (italics supplied)
"In the *Robinson* case, cited above, it was specifically held that credit must be given for time in jail pending appeal; and Judge Onion in the *Griffith* case, cited above, followed the *Robinson* case and held that the effect of the *Robinson* case was to destroy the trial court's discretion under Article 42.03 as to granting credit for time in jail pending appeal, and that *Robinson* means such credit must be given by subtracting from the total time given in the sentence. (457 S. W. (2) 65)
"The reasoning behind both the *Robinson* and *Griffith* cases is that to leave it discretionary with the judge whether jail time will be subtracted is to deter a defendant from appealing out of fear that it will cost him time if his appeal is unsuccessful, and *that such deterrence is a denial of due process.* (italics supplied)

"It is likewise an unfair situation if the trial court has discretion to deny part of the pre-sentence jail time. Once it is denied the defendant is impeded in the free choice of making an appeal because he knows that his total time is already

not to be credited and that it may better behoove him to forego an appeal in the hope of more quickly getting a parole or otherwise being discharged from the Penitentiary.

"Judge Onion recognized that such might well be the case, because he pointed out in his opinion in *Griffith* (footnote 3 at 457 S. W. (2) 66) as follows: "It is conceivable, however, that trial judge's discretion as to granting credit for presentence custody could be employed in such manner as to deter an accused's right of appeal. *If it is, then a constitutional question may well be presented.*" (italics supplied)

"In this connection, we would point out that the *Gremillion v. Henderson* case (425 F. (2) 1293) was decided a few days prior to *Robinson* and it did not involve the situation of an appeal, so deterence of appeal was not possibly involved, and the *Gremillion* case was the only basis for Judge Onion's observation that *Robinson* did not affect the discretion of the trial court as to presentence time.

"Surely Judge Onion was impressed with the point that a defendant who is denied credit for pre-sentence time in custody may well be deterred from appealing because he would naturally figure that the time on appeal, plus the time of pre-sentence custody, would add up to more time than he would have to spend in custody if he forewent the appeal and went immediately to the penitentiary and took his credit for good conduct. (In Pruett's case here, with a two-year sentence, he could have been released in 14 months. He has

already spent 22 months in jail.) Therefore, it is reasonable to say that denial of pre-sentence time is calculated to discourage appeal almost as much as denial of appeal time; *and that is the thing declared unconstitutional in Robinson, where the Court said: "defendant's right of appeal must be free and unfettered."* (426 F. (2) 798) (italics supplied)

"Furthermore, Article 42.03 certainly does not prohibit the trial court from in his discretion crediting pre-sentence time after appeal.

"And again, the the rule of *Pearce* requires that pre-sentencing time must be credited. For, "punishment already endured must be fully subtracted." 89 S. Ct. 2072, 2077.

"Mandatory Credit for Good Conduct, added to jail time, Now Requires Discharge.

"Article 5118a requires a credit of 1/3 of the time for good conduct. This applies, the way the statute is written, to "inmates of each county jail." Such statute does not exclude felons. Article 6184 l grants 20 days per month for Class I prisoners, and ten days per month for all Class II prisoners. Credit under any theory under either statute would grant Pruett sufficient time to require his release. Both statutes reqquire that a card or ledger be kept together with a calendar card showing all forfeitures of commutation of time and reasons therefor.

"No card and no ledger was kept on Johnnie Pruett, and therefore it must be conclusively presumed that "no charge of misconduct" was sustained against him.

We found no Texas case on this point, but the authorities outside of Texas are clear and apparently without conflict that such presumption of good conduct must be indulged, and that parol evidence of misconduct is inadmissible. 72 C. J. S. 886. Such was the exact holding in two Tennessee cases: *Gilliam v. State* (Tenn. 1939) 126 S. W. (2) 305, and *State v. McLellan*, 9 S. W. 233.

"Insofar as it may be argued that the Sheriff's statutory authority under Article 5118a to deny commutation is solely discretionary with him, we reply that such a construction *is to impute an unconstitutional delegation of legislative power to him. This was the exact holding in Fite v. State* (Tenn. 1905) *88 S. W. 941. It is settled in Texas that the Legislature can not delegate its power without at the same time setting up some reasonable standard for the administrator to follow: 53 Tex. Jur (2) 66; 12 Tex. Jur 406; 12 Tex. Jur (2) 410; 1 Tex. Jur. (2) 651.* (italics supplied)

"The Legislature must fix a reasonable standard for the administrator to follow: *Southwest Savings & Loan v. Falkner*, (Tex. Sup. Ct.) 331 S. W. (2) 917; *Nichols v. Dallas*, 347 S. W. (2) 326.

"Article 6184 l requires the credit set forth and says it "*shall*" be allowed. The fact that Article 5118a uses the word "may" must be ignored because to allow unlimited discretion is to allow invasion of legislative powers, but "may" must also be ignored for constitutional reasons. *It would deny the equal protection of the laws, within the meaning of the 14th Amendment to the Constitution of the United States, to say that felons must be granted credits but that county*

jail inmates need not be. Likewise, it would be unconstitutional argument to say that Johnnie Pruett has been neither fish nor fowl because he is not in the penitentiary and he is not the class of county jail inmate contemplated by Article 5118a. He is entitled to the equal protection of the laws. (italics supplied) Such was the holding in *Gilliam v. State* (Tenn. 1939) 126 S. W. (2) 305, where the offense was a felony but the trial judge in his discretion sentenced the prisoner to the County Workhouse, as the statute permitted. If the prisoner had been sent to the penitentiary he would have received credits under the penitentiary code. The workhouse statute did not provide for credits and did not provide for record keeping, as did the penitentiary statute. The Court held that the prisoner's right to credit could not be defeated by sending him to the workhouse, and that the statute for credits was a part of his sentence and, furthermore, that the failure of the county workhouse administrator to keep records saying whether the prisoner had shown good conduct, or bad conduct did not prevent the court from presuming, in the absence of such records, that the conduct was good.

"The tendency of the courts seems if possible to construe the statutes as entitling a prisoner to commutation as a matter of right, and not as a favor. 41 Am. Jur. 916. Where statutes are capable of two constructions, that construction is favored which would entitle the prisoner to release and discharge at the earliest possible time. 72 C. J. S. 886.

"*Pruett having already served longer than he presumably would have, had he not appealed, the Court should, at the very least let him complete his sentence*

on week-ends, assuming that the Court does not sustain our positions outlined above, which we believe the Court should.

"We believe that Article 42.03 expressly contemplates this. We urge that this boy, in any event, be now spared the stigma of penitentiary time. Here we appeal to the mercy and discretion of the Court.

Respectfully submitted,

David L. Tisinger
404 First National Life Building
Austin, Texas 78701
Phone GR 8-8331
Attorney for Johnnie Pruett